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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL S. GARCIA, Defendant and Appellant.	B212567 (Los Angeles County Super. Ct. No. SA061801)

APPEAL from a judgment of the Superior Court of Los Angeles County. Amy D. Hogue, Judge. Affirmed as modified.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, and Steven E. Mercer and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Following an hours-long attack on two high school-aged victims, a jury found Miguel S. Garcia guilty of four counts of forcible rape, one count of sodomy by force, two counts of forcible oral copulation, two counts of sexual penetration by foreign object, two counts of robbery, one count of false imprisonment by violence, and one count of criminal threats, with findings that he personally used a firearm on all 13 counts. The trial court sentenced Garcia to an indeterminate term of 25 years to life on one rape count, plus consecutive upper terms on the remaining sex crimes, plus consecutive one-third the middle base terms on the four nonsex crimes, resulting in an aggregate determinate term of 168 years 8 months. We affirm all of Garcia's convictions, but find a violation of Penal Code section 654 in imposing consecutive sentences on counts 12 and 13, and that his indeterminate term must be 15 years to life, rather than 25 years to life. We remand the cause to the trial court with directions to modify Garcia's sentence to reflect the noted sentencing adjustments, and, as modified, affirm the judgment.

FACTS

Cynthia R. and some girlfriends went to a party at Ian H.'s apartment in Culver City at about 10:00 p.m. on September 15, 2006. Jason S. and some of his friends arrived at the party at about the same time. At some point after they arrived at the party, Cynthia met Jason, a schoolmate whom she thought "was a good looking guy," and they spoke for a short while. When Jason walked away from Cynthia, Garcia approached her and tried to talk to her. Cynthia thought Garcia "looked . . . intoxicated or something," so she "kind of avoided him." Sometime around midnight or 1:00 a.m. (now September 16), Cynthia's girlfriends left the party, but Cynthia decided to stay and talk to Jason, who had offered to drive her home.

While Cynthia and Jason were talking in a bedroom, Garcia opened the door two separate times and looked into the room. After Garcia's second intrusion, Cynthia and Jason decided they should leave the bedroom. When Cynthia opened the bedroom door, Garcia confronted her in the doorway and demanded her cell phone. Garcia then pushed both Cynthia and Jason back into the room and grabbed Cynthia's phone from her hand. Garcia then took out a gun and some shoelaces and commanded Cynthia to tie Jason's

hands behind his back. After Cynthia finished, Garcia decided that Jason's hands were not bound tightly enough, and Garcia retied Jason's hands, then tied his hands to his feet, and pushed him into a closet. Garcia told Jason not to move or say anything, closed the closet door, and used a four-foot stone object to block the closet door.

Garcia then turned his attention back to Cynthia, pointed the gun at her, and told her to undress and lie on the bed. When Cynthia asked Garcia to let her go, he told her to shut up, removed his sweatshirt, pulled his pants down to his ankles, and then forced his penis inside her vagina. Garcia kept the gun pointed at Cynthia's head the entire time.

After Garcia had been raping Cynthia for a "long" time, he heard a noise in the closet, and went to check on Jason. Garcia told Jason to shut up or he would get shot. Garcia then returned to Cynthia and asked her if she "did crystal meth." When Cynthia said no, Garcia replied that he was going to make her do some crystal meth, and then forced his penis into her mouth, causing her to gag. When Cynthia started gagging, Garcia told her that she had better not vomit or he would make her "eat it." Garcia then ordered Cynthia to get down on her knees on the floor, with her back facing him. While keeping the gun in Cynthia's back, Garcia spat on his hand, put the saliva over Cynthia's vagina and back, and then forced his penis into her anus. When Cynthia continued crying, Garcia told her to shut up or he would shoot her. While Garcia's penis was in Cynthia's anus, he began "sticking his fingers, too" into her vagina and anus. Garcia penetrated Cynthia with his fingers "[a]bout five" times.

Meanwhile, Jason began making noises and moving around in the closet again. After sodomizing and penetrating Cynthia, Garcia again checked on Jason. Garcia told Jason, "Don't move or I'll blow your head off." Garcia then returned to the bed and forced his penis inside Cynthia's vagina again. While he raped Cynthia this time, Garcia began asking her where she and her family lived. Cynthia tried to ask Garcia about his family, and what he would think if someone did what he was doing to her to his sister or mother, but Garcia just continued the rape.

At around 3:30 or 4:00 in the morning, Cynthia told Garcia that she needed to go to the bathroom. Garcia told her to "pee" on herself. When Cynthia started crying and saying no, Garcia took her to the bathroom. Cynthia sat on the toilet, and Garcia told her to give him oral sex and put his penis in her mouth. Garcia then took Cynthia back into the bedroom, and again put his penis into her vagina. When Cynthia continued to ask Garcia to let her go, Garcia told her that he wanted her to call him the next day. Cynthia asked Garcia why he was doing this to her, and Garcia replied that it was because she brushed him off at the party earlier. He told her that it was all her fault, that she should never have done that. Garcia had the gun in his hand the entire time.

Finally, Garcia said he was going to let Cynthia go. Garcia went to the closet a last time to check on Jason. Garcia took Jason's wallet and searched it, but there was no money in it. He then took Jason's iPod that had fallen out of his pocket when Garcia pulled his wallet from his pants. Garcia and Cynthia got dressed. Garcia put his gun away and walked Cynthia out of the apartment. As they were walking out, Garcia told Cynthia that his bike was in the alley and to follow him toward the back. Garcia threatened to kill Cynthia if he saw the police at his house the next day. As soon as they walked out, Cynthia walked in the opposite direction of Garcia. She saw a police car at the corner, walked over to the vehicle, and told the officer what had happened.

In the meantime, Jason heard Cynthia and her assailant leave the room. Jason got loose from his bindings and jumped out of the window. He went to his car and drove home, where he told Ian what had happened. Jason was visibly distraught, had bruised wrists, and looked beaten up.[1]

Following the attack, police showed Cynthia two separate "six-pack" photograph lineups. Cynthia identified Garcia as her assailant from the second set of photographs.

Los Angeles Police Department Detective Rick Gonzales, accompanied by Detective Porter, interviewed Garcia on July 17, 2007, a few hours after he had been taken into custody. During his interview, Garcia stated that he had gone to the party, and that he

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[1] Photographs of Jason's bruised wrists were introduced as evidence during his testimony at Garcia's trial.

had forced Cynthia to have sex with him and to orally copulate him. He admitted that he had tied up Jason and put him a closet. Garcia stated that he had a .22-caliber gun with him.

In October 2007, the People filed an information charging Garcia with the following crimes:

Count 1: Forcible rape (Pen. Code, § 261, subd. (a)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 2: Sexual penetration by foreign object (Pen. Code, § 289, subd. (a)(1)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 3: Sexual penetration by foreign object (Pen. Code, § 289, subd. (a)(1)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 4: Sodomy by use of force (Pen. Code, § 286, subd. (c)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 5: Forcible rape (Pen. Code, § 261, subd. (a)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 6: Forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 7: Forcible rape (Pen. Code, § 261, subd. (a)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 8: Forcible oral copulation (Pen. Code, § 288a, subd. (c)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 9: Forcible rape (Pen. Code, § 261, subd. (a)(2)), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 10: First degree residential robbery (Pen. Code, § 211), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 11: First degree residential robbery (Pen. Code, § 211), with a personal firearm use allegation (Pen. Code, § 12022.53, subd. (b));

Count 12: False imprisonment (Pen. Code, § 236), with a personal firearm use allegation (Pen. Code, § 12022.5, subd. (a)); and

Count 13: Criminal threats (Pen. Code, § 422), with a personal firearm use allegation (Pen. Code, § 12022.5, subd. (a)).

The charges were tried to a jury in October 2008. Cynthia identified Garcia as her assailant, testifying, "No, I don't have any doubt." Jason's account of the attack largely mirrored Cynthia's account, but he maintained that he could not identify the male assailant. Ian H. testified that Garcia had been at the party, and that Garcia had suggested they "go train" Ian's girlfriend. Ian understood Garcia to be suggesting that they engage in serial sex acts with Ian's girlfriend.

On October 3, 2008, the jury returned verdicts finding Garcia guilty on all counts, and found all of the firearm use allegations to be true.

On November 5, 2008, the trial court sentenced Garcia as follows:

Count 1: 25 years to life.

Count 2: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 3: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 4: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 5: 8 years (the upper term) plus 10 years for the gun enhancement; consecutive.

Count 6: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 7: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 8: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 9: 8 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 10: 6 years (the upper term), plus 10 years for the gun enhancement; consecutive.

Count 11: 1 year 4 months (one-third the midterm), plus 3 years 4 months (one-third the midterm) for the gun enhancement; consecutive.

Count 12: 8 months (one-third the midterm), plus 1 year 4 months (one-third the midterm) for the gun enhancement; consecutive.

Count 13: 8 months (one-third the midterm), plus 1 year 4 months (one-third the midterm) for the gun enhancement; consecutive.

DISCUSSION

I. The Trial Court Properly Admitted the Gang Evidence

Garcia contends that all of his convictions must be reversed because the trial court abused its discretion in allowing the prosecution to introduce "gang affiliation" evidence. We reject Garcia's contention for several reasons.

A. The Setting

Before trial, the prosecutor and Garcia's defense counsel agreed that the People would advise their witnesses not to mention anything about Garcia's gang membership, but that Garcia's own reference to his gang membership, during his interview by police, would be admissible. At trial, the prosecutor abided by this arrangement during her direct examination of Cynthia. The problem arose when Garcia's defense counsel cross-examined Cynthia. He asked this question in an apparent attempt to impeach the credibility of her identification of Garcia as her attacker: "[D]o you recall telling the police that at some point during this whole ordeal, that you saw the suspect in this case remove his shirt, and you saw a tattoo across his stomach in an arch form that said Culver City?"[2] Cynthia answered that she had seen a tattoo on Garcia's stomach, but she "couldn't see what it said, because it was in weird writing," and that it had been Garcia who had told her it read Culver City. When defense counsel again asked Cynthia whether she had told the police that the suspect had a tattoo which said Culver City, Cynthia replied, "Yes, I recall telling [the police] that I saw it."

During the prosecutor's redirect examination, the following exchange occurred without any objection by defense counsel:

> "[THE PROSECUTOR]: You indicated on cross-examination that you had told the police that he had a tattoo?
>
> "[CYNTHIA]: Yes.
>
> "[THE PROSECUTOR]: Could you describe what you were able to see about the tattoo in the bedroom?

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[2] The record suggests that Garcia actually has a tattoo on his stomach which reads Mexican Pride 13.

"[CYNTHIA]: It was arched across his stomach.

"[THE PROSECUTOR]: And what kind of lettering was on the tattoo?

"[CYNTHIA]: It was like old English or weird writing, I don't know, I don't know what kind of writing. You couldn't really see it if you were to just glance at it. You would have to really look at it.

"[THE PROSECUTOR]: Were you able to personally see -- what the words said?

"[CYNTHIA]: No.

"[THE PROSECUTOR]: And did you indicate on cross-examination that he, in fact, told you it said Culver City?

"[CYNTHIA]: Yes.

"[THE PROSECUTOR]: But as far as you could see, you just saw old English lettering?

"[CYNTHIA]: Right

"[THE PROSECUTOR]: About how big were the letters?

"[CYNTHIA]: About this big (indicating).

"[THE PROSECUTOR]: Indicating, for the record, maybe five or six inches.

"[CYNTHIA]: Yeah, five or six inches.

"THE COURT: Okay.

"[THE PROSECUTOR]: Your Honor, could we please have the defendant lift up his shirt and show it to the court and jury?

"THE COURT: Yes. [¶] . . . [¶]

"[THE PROSECUTOR]: When you look at the stomach of the defendant here, does this resemble any of the lettering that you saw that evening?

"[CYNTHIA]: Yes."

On recross-examination, defense counsel again asked Cynthia whether she had told the police that she saw the words Culver City, and Cynthia again answered, "Yes, I did."

After defense counsel finished his recross-examination, the following exchange occurred outside the presence of the jury:

"THE COURT: Counsel [addressing the prosecutor], was there something you wanted to raise? [¶] Do you want to do that right now?

"[THE PROSECUTOR]: It's a very interesting conundrum the People are in right now, Your Honor, because we had spoken earlier of not getting into any gang information, and so we purposefully kept all of that out, even though it was a huge factor of how [Garcia] intimidated [Cynthia] and how he frightened her into acquiescence. [¶] And then counsel brings up the thing on his stomach, which he told her was Culver City to further intimidate her. And also our theory is, is that if she ever told on him, [the police] would think it was a Culver City gang member. [¶] Now I think he's opened the door, and we have to further pursue this.

"THE COURT: [Defense Counsel]?

"[DEFENSE COUNSEL]: Your Honor, the intimidation factor that, I will kill you, I have friends to kill you, or, you know, to hurt you, was already said. It was already said by her that was -- the intimidation was already extended. [¶] I merely wanted to show that her identification that she related to the police, was that something different than what was on my client's tattoo.

"THE COURT: I couldn't see the tattoo, because --

"[THE PROSECUTOR]: It's another gang. So he's introduced this whole thing now, which we were specifically keeping out, or we would have gone into the whole tattoo thing, and we would have gone into what was the significance of when he told you it was Culver City.

"THE COURT: What does it actually say?

"[THE PROSECUTOR]: It's Mexican Pride 13.

"THE COURT: Okay.

"[DEFENSE COUNSEL]: Well, that's fine.

"[THE PROSECUTOR]: . . . I mean counsel has opened this huge door that we were trying to keep out for his benefit. [¶] . . . But we have to further explore this now, because now it just seems like [Cynthia] didn't know what was going on.

"[DEFENSE COUNSEL]: I didn't ask my client to lift up his shirt.

"[THE PROSECUTOR]: But you brought up his stomach.

"THE COURT: Right. And there was no objection when he did.

"[DEFENSE COUNSEL]: No, there's no objection, Your Honor. It's not -- that's not the point. [¶] The point was she had already mentioned that she had been intimidated by his, quote, friends, which would take care of her if she told the police.

"[THE PROSECUTOR]: She didn't talk about that.

"[DEFENSE COUNSEL]: Something to that effect.

"THE COURT: She didn't go quite that far. She said he threatened her family, and something would happen. But the way she put it, as I took it, didn't really implicate gang issues. [¶] It seems to me to the extent that [defense counsel] has sought to impeach the witness based on the tattoo and the significance of it, the People can rehabilitate her. . . . [¶] . . . [¶]

"THE COURT: Well, I suppose for the issue of force or fear, which is an element of many of the charges, it's fair for the People to bring out her fear. And if the fear rests, in part, on her perception that this was a potentially gang-related matter, I think it is fair for the People to bring that out at this point. [¶] Now I don't think we want to spend a lot of time on it. Because frankly, under Evidence Code [section] 352, we have received a great deal of evidence about the force and fear factor. We have heard about a gun and loads of other pieces of evidence that would certainly support her fear. [¶] So under Evidence Code [section] 352, I think the potential probative value of adding more elements to fear is not great. So I don't want to get into a long tangent on this.

"[THE PROSECUTOR]: And neither do I. And I didn't want to even go there at all. [¶] But there is one other avenue where it really is relevant, which is the guy looked like a gang member. I mean one of the first things she told me is that when these kids crashed the party, the defendant's crowd, she knew they didn't belong, they were gang members. [¶] And so when he tells her, this says Culver City, she believed it, because they all looked like Culver City gang members. [¶] So it's not a case of her confused mistaken I.D. when you already have a preconceived idea of who somebody is, and then they tell you, oh, it says Culver City, it's much easier to understand why she believed that then as counsel would have it be, that she read the words of a Culver City person, and it wasn't him. [¶] So that goes to her credibility in terms of I.D.

"THE COURT: So what you're asking, what you want to go into, if you can summarize for me, so that I can rule.

"[THE PROSECUTOR]: Okay, I simply want to introduce the photograph of his tattoo and his stomach, so that we actually have it, so we can use it in argument later. [¶] And then I just want to ask her, when he said Culver City, what did that mean to you? I don't want to belabor this anymore than I did before.

"THE COURT: That seems fair.

"[THE PROSECUTOR]: But I just want to clear it up, too.

"[DEFENSE COUNSEL]: Your Honor, I think at the time that she discovers Culver City or whatever, his tattoo, she's already in bed, she's got a penis insider of her vagina, she's already been intimidated with a gun, with the fact that her boyfriend has been allegedly tied up and thrown in a closet. [¶] You know, what are we doing? Are we just beating a dead horse?

"THE COURT: No, I don't think so. I think limiting it to just those areas that [the prosecutor] mentioned, it's fair enough as rehabilitation, because you have been working to impeach the witness on what the tattoo said. [¶] So I think it's fair for [the prosecutor] to show a photograph, and fair for her to just make the questions she referred to. Beyond that, I do agree with [defense counsel], you know, it's overkill.

"[THE PROSECUTOR]: And I just want to ask again, did she actually read the words?

"THE COURT: Yes."

After the break, the prosecutor asked Cynthia "did [she] ever get a chance to actually read the words off [Garcia]'s stomach," and Cynthia stated that she did not, and that Garcia himself had told her the tattoo said Culver City. The prosecutor further asked Cynthia whether that information had any significance to her, and Cynthia answered, "That he was a gang member," and that his threats made her scared because he said he was from the Culver City gang. The prosecutor's entire re-redirect examination covers about three and one-half pages of the reporter's transcript.

B. Garcia Forfeited His Claims of Error Regarding the Gang Affiliation Evidence

Garcia forfeited his claims of gang evidence error for two reasons. First, Garcia broadly waived his claim of error by opening the issue of his gang affiliation when he

asked Cynthia, in an attempt to impeach her credibility, whether she had told police that Garcia had a Culver City gang tattoo on his stomach. A party who offers an inadmissible subject into evidence may not claim any error on appeal related to the admission of the evidence on that very subject. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1168.)

Second, Garcia specifically waived his claims that the gang evidence elicited from Cynthia after the recess — there was no objection to the evidence which had been elicited before the recess — violated the "character" evidence rules embodied in Evidence Code section 1101. When the issue of gang evidence was addressed at the short trial recess immediately before the prosecutor's re-redirect examination (see *ante*), Garcia's counsel objected that permitting the prosecution to delve any further into the matter of his gang affiliation would be like "beating a dead horse." We read this objection to constitute an assertion that the evidence was not admissible under section 352 because it would consume too much time in return for little more than a cumulative effect on an issue already addressed before the recess. The trial court considered the matter with the same section 352 understanding in mind. Because Garcia failed to object that Cynthia's post-recess, gang-related testimony was inadmissible under section 1101, he has forfeited that specific claim of error on appeal. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 626.)

C. There Was No Error in any Event

Although Evidence Code section 1101, subdivision (a), provides that evidence of a person's character generally is not admissible, its evidentiary proscription is not absolute. On the contrary, section 1101, subdivision (c), provides that "[n]othing" in section 1101 affects the admissibility of evidence which is "offered to support or attack the credibility of a witness." Because Garcia's trial counsel attempted to attack Cynthia's credibility by questioning her about her "mistaken" identification of Garcia vis-à-vis her mistaken identification of the gang tattoo on her attacker's stomach, and, because, the prosecution's ensuing "gang affiliation" evidence supported Cynthia's credibility, there simply was no violation of any proscription against character evidence embodied within section 1101. We review the trial court's ruling on issues implicating section 1101 for an

abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) We simply are unable to assign any unreasonableness in the trial court's decision in this case.

We also find no error under Evidence Code section 352. A trial court's exercise of discretion under section 352's provisions prescribing a balancing between the probative of evidence against its potential problems is also reviewed under the abuse of discretion standard. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) In exercising its discretion in Garcia's case, the trial court expressly and correctly found that the gang evidence was probative value on the issue of Cynthia's force and fear. Against this backdrop, we decline to find that the trial court's decision to allow a limited exploration of the issue cannot be said to violate section 352 as a matter of law. Garcia's attempt to challenge Cynthia's credibility added weight to the scales in favor of allowing the gang evidence's admission.

D. Assuming Error, There Was No Prejudice

Finally, we are amply satisfied that, had the jurors not heard the gang evidence, the result of Garcia's trial would have been the same. Cynthia identified Garcia at trial with "no doubt" in her mind. And although he did not specifically identify Garcia, Jason's description of the nature of the attack mirrored Cynthia's account. Further, Ian placed Garcia at the party contemporaneously with the attack on Cynthia and Jason. To cinch the case, Garcia's confession was admitted. Garcia presented no defense evidence. Apart from and in the absence of any reliance upon the gang affiliation evidence, the case against Garcia was overwhelming. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) To the extent Garcia challenges the trial court's failure to give a limiting instruction cautioning the jurors to consider the gang evidence solely on the issue of force and fear, and not to infer his criminal propensities, our prejudice analysis would be the same.

II. The Prosecutor Did Not Commit Misconduct

Garcia contends that all of his convictions must be reversed because the prosecutor engaged in misconduct during argument by referring to Garcia as an "animal." We reject Garcia's contention for several reasons.

A. The Legal Framework

A prosecutor runs afoul of the rules against "misconduct" when he or she employs "deceptive" or "reprehensible" trial tactics to persuade a jury. (*People v. Valdez* (2004) 32 Cal.4th 73, 122.) Where a claim of prosecutorial misconduct implicates a defendant's due process right to a fair trial, the misconduct is reviewed as an error of constitutional magnitude. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Where a prosecutor's conduct merely exposes jurors to some improper evidentiary matter, the misconduct may be reviewed under a harmless error standard. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 976.) Garcia's arguments in his current appeal case raise the specter of the former, "unfair" trial situation.

B. The Trial Setting

The prosecutor's argument consists of 21 pages of the reporter's transcript, accounting for both the opening and closing. Our review of it reveals Garcia's trial counsel interposed no objection at any point during either the prosecutor's opening argument or closing argument. On appeal, however, Garcia assigns prosecutorial misconduct to the following passage:

> "[THE PROSECUTOR]: Then we get [to the point] after the bathroom: Detective Porter [questioned Garcia], 'You left at some point after that, but not -- not before you put her back on the bed, forced your penis inside of her vagina again, do you remember?' And that's when the whole conversation [by Cynthia] went on about, 'Don't you have a dad? Don't you have a Mom? [And the detectives ask Garcia again,] You left after that, remember?' Detective Gonzalez, 'Well, do you remember?' Defendant, 'Yes, sir.' [¶] And we all remember that -- those statements, because it was almost too hard to hear, the first part where [Cynthia]'s asking just to go home to her dad, and then she's relying on something, *trying to find humanity in this animal*, like what if this happened to your mom? What if this happened to your sister? She's trying to find something within him to connect to. And all he did was [to] continue to rape her. . . ." (Italics added.)

C. Garcia Forfeited his Prosecutorial Misconduct Claim

A defendant may not complain on appeal of prosecutorial misconduct unless he or she made a timely objection at trial, asserting misconduct, and requested that the jury be

admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Garcia did neither at his trial.

D. There Was No Misconduct in any Event

Assuming Garcia's misconduct claim is not waived, there was no misconduct. The prosecutor's use of negative "epithets" are within the range of permissible comment on a defendant's conduct. (*People v. Thomas* (1992) 2 Cal.4th 489, 537 [prosecutor's use of epithets such as "perverted murderous cancer" and "walking depraved cancer" during closing argument not misconduct].)

Garcia's reliance on *People v. Fosselman* (1983) 33 Cal.3d 572 (*Fosselman*), for a different result is misplaced. Although it is true that the prosecutor in *Fosselman* referred to the defendant as an "animal . . . out to get somebody that morning" (*id.* at p. 580), the prosecutor also made insinuations that the defendant had failed a sobriety test which had not been introduced into evidence, and that the defendant had prior arrests, and had been on trial in the past. In concluding the prosecutor had engaged in misconduct, the Supreme Court explained: "Viewing each of the various instances of the prosecutor's conduct in isolation, and without expressing approval of any of them, we might not be compelled to label his performance as grossly improper. Considering them as a whole, however, we must conclude that he did indeed commit misconduct." (*Id.* at pp. 580-581.) And *People v. Herring* (1993) 20 Cal.App.4th 1066, also cited by Garcia, is similar in that a prosecutor "repeatedly" referred to a defendant in such terms as a "dog in heat." (*Id.* at pp. 1073-1074.) Garcia simply has not convinced us that a single use of the word "animal," particularly in the context in which it was used at his trial, where the prosecutor was discussing a high school age victim who was being sexually assaulted while begging her assailant to let her go home to her parents, amounts to prosecutorial misconduct. In the final analysis, a claim of prosecutorial misconduct in the context of closing argument is largely a matter of the degree of prejudice imparted by the prosecutor's comments. Upon reading the reporter's transcript, we do not find a possibility that the jury convicted Garcia due to passion and prejudice caused by the word "animal," rather than the evidence.

III. The Reasonable Doubt Instructions Were Proper

Garcia contends all of his convictions must be reversed because the trial court's instructions on the presumption of innocence and the burden of proof via the standardized CALCRIM Nos. 103 and 220 implicitly instructed the jurors that they were precluded from considering the "lack of [forensic] evidence" against him. Garcia further contends the instructions reduced the prosecution's burden of proving the charges against him beyond a reasonable doubt. We reject Garcia's claim of "reasonable doubt" instructional error.

A. Garcia Did Not Forfeit his Claim of Error

Before addressing Garcia's claims of instructional error, we dispatch with the People's contention that Garcia has forfeited his claims. Although a defendant's failure to interpose an instructional error objection at trial generally forfeits his or her right to raise the issue on appeal, a claim of instructional error is not forfeited where a defendant contends that the error affected his or her substantial rights. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) Because Garcia contends that the trial court's instructions with CALCRIM Nos. 103 and 220 resulted in a violation of his due process right to require the People to prove the charges against him beyond a reasonable doubt, we accept that his claim of error is not forfeited.

B. CALCRIM Nos. 103 and 220 Are Not Defective

For the reasons explained in *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269 (*Guerrero*), *People v. Flores* (2007) 153 Cal.App.4th 1088, 1091-1093, and *People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510 (*Westbrooks*), we reject Garcia's contention that CALCRIM No. 220 violated his due process rights by suggesting impermissible elements within the definition of reasonable doubt. The instruction expressly directs jurors that, "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty." The only reasonable understanding and application of CALCRIM No. 220's language is that a "lack of evidence" is ground for a reasonable doubt, and nothing in the instruction dissuades jurors from considering any perceived "lack of evidence." Stated in

other words, any reasonable juror who applies CALCRIM No. 220 would, in the face of a lack of evidence from the government, find that proof beyond a reasonable doubt also is lacking, and would acquit the defendant.[3]

We are not persuaded to reach a different result based upon Garcia's reliance on *Coffin v. United States* (1895) 156 U.S. 432. According to Garcia, the Supreme Court in *Coffin* considered a set of reasonable doubt instructions which were "essentially the same" as CALCRIM No. 220 and found they were constitutionally deficient. This means, says Garcia, that CALCRIM No. 220 must be equally unconstitutional. We disagree because the instructions which were at issue in *Coffin* do not strike us as "essentially the same" as CALCRIM No. 220. In *Coffin*, a trial court refused a defense request to include an instruction that " '[t]he law presumes that persons charged with crime are innocent . . . . ,' " and its reasonable doubt instruction included this language: "[I]f, after weighing all the proofs *and looking only to the proofs*, you impartially and honestly entertain the belief that the defendants may be innocent of the offences charged against them, they are entitled to the benefit of that doubt and you should acquit them." (*Coffin*, at p. 453, italics added.) The Supreme Court ruled that the combination of the refusal to instruct the jury of the presumption of innocence and the instruction limiting consideration to "the proofs" had resulted in error for the following reason: " 'The proofs and the proofs only' confined [the jurors] to those matters which were admitted to their consideration by the court, and among those elements of proof the court expressly refused to include the presumption of innocence, to which the accused was entitled, and the benefit whereof both the court and the jury were bound to extend him." (*Id.* at p. 461.) In other words, a court cannot tell a jury that they are limited to certain matters and then not include the presumption of innocence within those matters. The instructional error described in *Coffin* is simply not the same as Garcia claims in his current case because the trial court at Garcia's trial did, in fact, instruct the jury on the presumption of

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[3] For the record, we note that we have previously followed *Westbrooks* and *Guerrero*. (See, e.g., *People v. Marquez* (Dec. 2, 2008, B193733) [nonpub. opn.].)

innocence and related principles. *Coffin* does not support Garcia's claim of instructional error.

Garcia's coupling of CALCRIM No. 103 to CALCRIM No. 220 adds nothing to the discussion. The language of CALCRIM No. 103 overlaps CALCRIM No. 220, and we see nothing in the former which suggests to us that, when coupled with the latter, an instructional error occurred precluding the jurors from considering any perceived "lack of evidence," or lowering the People's burden of proof.

IV. The Use of CALCRIM No. 226 Did Not Create Reversible Error

Garcia next contends that all of his convictions must be reversed because the trial court, in accord with CALCRIM No. 226, instructed the jurors to use their "common sense and experience" in deciding whether the witnesses' testimony was true. According to Garcia, the standard CALCRIM instruction regarding "common sense" is "troubling" because its language "likely encourages jurors to consider matters not in evidence," namely, their common sense and experience. This creates, says Garcia, a "genuine danger" that jurors may "employ a standard less than proof beyond a reasonable doubt since 'common sense' can be used as a substitute for objective . . . evidence of guilt." We find no error.

A. Garcia Did Not Forfeit his Claim of Error

Before addressing the merits of Garcia's claim of instructional error on appeal, we reject the People's contention that he forfeited his claim because he did not object at trial. Garcia's contention that CALCRIM No. 226 lowered the prosecution's burden of proof is sufficient in our eyes to overcome the general rule that his failure to object to the instruction at trial waived his claim of instructional error on appeal. (*People v. Anderson, supra,* 152 Cal.App.4th at p. 927.)

B. CALCRIM No. 226 Did Not Lower the Prosecution's Burden of Proof

For the reasons articulated by Division Two of our court in *People v. Campos* (2007) 156 Cal.App.4th 1228, we reject Garcia's contention that the use of CALCRIM No. 226 at his trial commands reversal of his convictions. An instruction to jurors to use common sense and experience does not grant jurors a license to consider matters outside

of the evidence in violation of the defendant's right to due process, but merely tells them that the prism through which the witnesses' credibility should be evaluated is the jurors' common sense and experience. (*Id*. at p. 1240.) Garcia's arguments do not persuade us that an instruction telling jurors to use their common sense creates a real possibility that they may convict a defendant based on their "common sense assessment of guilt," rather than by finding him or her "guilty beyond a reasonable doubt."

V. Penal Code Section 422 Is Not Unconstitutionally Vague on its Face

Garcia contends his conviction for criminal threats against Jason (count 13) must be reversed because the criminal threats statute (Pen. Code, § 422) is unconstitutionally vague *on its face*. According to Garcia, the statute is constitutionally deficient because it grants "unfettered discretion" to law enforcement officers to decide for themselves what type of statement amounts to a threat — in the words of the statute — "to commit a crime which will result in death or great bodily injury." For the reasons articulated by Division Five of our court in *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 (*Maciel*), review denied February 24, 2004, we disagree with Garcia's constitutional challenge to section 422.

As explained by Division Five:

> "Defendant challenges as vague the language in Penal Code section 422, 'willfully threatens to commit a crime which will result in death or great bodily injury.' We construe the challenged language in context, taking into account the other elements that must be established in order for the statute to be triggered. Penal Code section 422 does not criminalize all threats of crimes that will result in death or great bodily injury, leaving to law enforcement to determine those threats that will result in arrest. Instead, the statute criminalizes only those threats that are 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' This language means that not all threats of crimes that will result in great bodily injury are criminalized, but only serious threats, intentionally made, of crimes likely to result in immediate great bodily injury. Moreover, the statute also includes a specific intent element: 'with the specific intent that the statement . . . is to be taken as a threat.' A statute that criminalizes

> threats of crimes that will result in great bodily injury with the intent to place the victim in sustained fear for personal safety or the safety of immediate family members adequately advises an individual and law enforcement of the conduct prohibited by the statute. One who willfully threatens violence against another, intending that the victim take the threat seriously and be fearful, cannot reasonably claim to be unaware that the conduct was prohibited." (*Maciel, supra*, 113 Cal.App.4th at p. 685.)

Garcia's discussion regarding *State v. Hamilton* (Neb. 1983) 340 N.W.2d 397, in which the Nebraska Supreme Court ruled that a Nebraska "terroristic threats" statute was unconstitutionally vague, does not persuade us to reach a different result. First, we agree with *Maciel*'s reading of Penal Code section 422 in the constitutional vagueness context. Second, insofar as we are able to ascertain from the Nebraska case, the Nebraska statute was not, as Garcia suggests, "quite similar" to section 422. On the contrary, a major problem noted in the Nebraska case was that the Nebraska terroristic threats statute did not include a specific intent element, which, as *Maciel* correctly notes, is not the situation with the statutory language in section 422.

VI. With One Exception, Mandatory Consecutive Terms Were Proper Under Penal Code Section 667.6, Subdivision (d), But the Error Was Harmless

Garcia contends the trial court erred by imposing mandatory consecutive terms on "one of the rapes, one of the oral copulations and one act of sexual penetration" pursuant to Penal Code section 667.6, subdivision (d). More specifically, Garcia contends the trial court erred in applying the mandatory consecutive sentencing scheme prescribed in section 667.6, subdivision (d), "to the sexual offenses which occurred after Garcia checked on Jason in the closet and asked Cynthia if she used methamphetamine." The series of crimes within that specified time frame, says Garcia, were "a continuous course of sexual activity that involved nothing more than simultaneous sexual acts and changes of position." We agree with Garcia's contention only as to one count of sexual penetration by force. However, because the trial court indicated full consecutive sentences were appropriate either under the mandatory provision of section 667.6, subdivision (d) or the discretionary provision in subdivision (c), we find the error harmless.

A. The Legal Framework

Penal Code section 667.6, subdivision (d), provides that a sentencing court "shall" impose consecutive terms for multiple, enumerated sexual offenses committed against a single victim on "separate occasions." In determining whether multiple sex crimes were committed on "separate occasions," the trial court "shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (*Ibid*.) The trial court's finding that multiple sex crimes occurred on "separate occasions" is a finding based in fact, and, as such, will not be disturbed on appeal where a reviewing court's review of the record discloses substantial evidence in support of the trial court's finding. (*People v. Plaza* (1995) 41 Cal.App.4th 377, 384, 385 [a trial court's finding that defendant had the required opportunity to reflect upon his actions "will be upheld unless no reasonable trier of fact could have so concluded"]; *People v. Pena* (1992) 7 Cal.App.4th 1294, 1314.)

Penal Code section 667.6, subdivision (d) prescribes when the court *must* impose a consecutive sentence in sex offenses cases. However, if subdivision (d) is not applicable, a court always has *discretion* to impose full-term consecutive sentences for multiple sex convictions under section 667.6, subdivision (c). That section provides, "[i]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. . . ." When a sentencing court employs subdivision (c), it must state a reason for imposing a consecutive sentence and a separate reason for imposing a full consecutive sentence in lieu of the ordinary one-third the middle term as provided in section 1170.1. (*People v. Osband* (1996) 13 Cal.4th 622, 729, citing *People v. Pock* (1993) 19 Cal.App.4th 1263, 1277.) It may, however, use the same reason for both choices. (*Ibid*.) "What is required is an identification of the criteria which justify

use of the drastically harsher provisions of section 667.6, subdivision (c). The crucial factor, in our view, is that the record reflect recognition on the part of the trial court that it is making a separate and additional choice in sentencing under section 667.6, subdivision (c)." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. omitted.)

B. The Sentencing Setting

On November 4, 2008, the People filed a six-page sentencing memorandum which identified various factors in aggravation and mitigation, and included a "computation of sentence" based upon applications of Penal Code sections 667.61, 667.6, subdivisions (c) and (d). With regard to consecutive sentencing on counts 2 through 9, the People's sentencing memorandum explained that consecutive sentences were justified under the mandatory provisions of section 667.6, subdivision (d), because Garcia's multiple sex crimes occurred on separate occasions within the meaning of that subdivision. The People's memorandum further explained, "[i]n the event that the court [was] uncomfortable using the mandatory sentencing scheme [prescribed by section] 667.6(d), it [could] nevertheless impose consecutive sentences under [section] 667.6(c)." Under either subdivision, the memorandum calculated that the imposition of consecutive sentences would provide for an aggregate determinate sentence of 168 years (it actually added up to 168 years 8 months), and included a short-hand "sentencing matrix" showing the calculation of such a sentence.

At the sentencing hearing on November 5, 2008, the trial court made the following oral statements explaining its reasons for imposing the aggregate determinate term of 168 years 8 months:

> "THE COURT: . . . I have received, and very much appreciate, the People's detailed sentencing memorandum. And I am inclined to follow the recommendations of the People. [¶] [Defense counsel], did you want to be heard about that?
>
> "[DEFENSE COUNSEL]: Yes, Your Honor. [¶] I would like the court to please consider the fact that my client has no prior record. And as another mitigating circumstance, that he voluntarily acknowledged wrongdoing at an early stage of the whole criminal process. I believe the evidence showed that he made statements to the police officer indicating

his implication in this matter. [¶] And finally, Your Honor, I would ask the court to consider concurrent time on all the sex crimes as, again, the evidence shows that they were basically one continuous act. . . .
[¶] . . . [¶]

"THE COURT: [¶] . . . [¶] . . . The court denies probation. I am sentencing the defendant in accordance with the matrix presented to me by the People. [¶] The court selects the high term, having heard the evidence as the jury did from the alleged victim in the case, in particular that the crime[s] involved violence, bodily harm, threats of harm, cruelty, callousness. [¶] There was the use of a weapon. It was a very vulnerable victim, a high school student. There was also testimony of efforts to dissuade witnesses from testifying. [¶] And there was certainly an indication of planning, sophistication and professionalism, because the defendant came to the door, left, and returned with shoestrings and a weapon in his possession . . . , suggesting, again, significant planning and sophistication. [¶] So the sentence will be computed as recommended by the People. . . . [¶] On count 1, the sentence is 25 years to life. [¶] On counts 2 through [9], imposed consecutively, the term is eight years. Under 12022.53(b), the court imposes an additional ten years because of the use of a weapon, all to run consecutively. [¶] On count 10, the sentence is six years, again plus the gun enhancement of ten years. [¶] On count 11, the sentence is one year, four months, plus three years, four months, which is one-third the enhancement under 12022.53(b). [¶] Under count 12, it's eight months plus one year and four months, again one-third of the midterm of 12022.5. [¶] And exactly the same sentence on count 13, eight months plus one year, four months, one-third of the midterm under 12022.5. [¶] That makes the total determinate term 168 years, plus an indeterminate term of 25 years to life. . . . [¶] . . . [¶] I just want to also make clear for the record that on counts 10 through 13, I am sentencing the defendant in accordance with Penal Code section 1170. [¶] And that under counts 2 through 9, I am sentencing the defendant pursuant to Penal Code section 667.6(c) or (d). [¶] Count 1 is a sentencing under Penal Code section 667.61. [¶] . . . [¶] I have also taken into account the circumstances in mitigation suggested by [defense counsel], however, I feel they are outweighed by the circumstances in aggravation."

C. Analysis

Substantial evidence supports the trial court's finding that Garcia had a reasonable opportunity to reflect upon his actions between forcing Cynthia to orally copulate him on the edge of the bed, and then sodomizing her on the bedroom floor. The two events were not, as Garcia asserts, a mere "changing of bodily positions to facilitate the next sex act."

While we are willing to accept that evidence of a mere changing of bodily positions is not sufficient, *by itself*, to establish the required reasonable opportunity to reflect, "especially where the change is accomplished within a matter of seconds" (*People v. Pena*, *supra*, 7 Cal.App.4th at p. 1316) this principle has no application in Garcia's current case. Far more than a mere changing of positions occurred between the crimes which Garcia cites in his argument. During the act of oral copulation which occurred on the edge of the bed, after Garcia checked on Jason in the closet, Cynthia began gagging, and Garcia possessed the wherewithal, grotesque as it was, to think through the possible outcomes of what was happening, and to tell Cynthia that she better not vomit or he would make her "eat it." Garcia then stopped his act of forcible oral copulation and ordered Cynthia to get off the bed, and to get down on the floor on her knees with her hands on the bed. Garcia then relocated himself behind Cynthia, put the gun to her back, spit saliva into his other hand, and rubbed it on her anus and vagina. He then sodomized her. The evidence establishing this sequence of events amply supports the trial court's factual finding that Garcia had a reasonable opportunity to reflect upon his actions between his crime of forcible oral copulation and his decision to commit his ensuing crime of sodomy.

The same reasonable opportunity for reflection is not, however, disclosed by the record with regard to Garcia's crime of sodomy and his sexual penetration crime. On the contrary, the record discloses that those two sex crimes occurred simultaneously. We have no doubt that Garcia could have reflected on whether he should have committed a second, simultaneous sex crime after he had already begun his crime of sodomy, but there was no intervening period in which he chose to "*resume* sexually assaultive behavior" against his victim because the sexually assaultive behavior which he initiated when he began sodomizing Cynthia never ended before he initiated his sexual penetration crime. Cynthia testified that Garcia was "sticking his fingers, too" while his penis was in her anus.

While we find the mandatory provisions of Penal Code section 667.6, subdivision (d) were not appropriately applied to this one count, we need not remand this case for resentencing on it. The prosecutor's sentencing memorandum set forth a concise

yet specific explanation of the discretionary choice a court has when choosing between sections 667.6, subdivision (c) and 1170.1. The trial court read the memorandum and after having done so, stated clearly that its intention was to impose full-term consecutive sentences on counts 2 through 10, whether it utilized the mandatory section 667.6, subdivision (d) or the discretionary provision found in section 667.6, subdivision (c). Under such circumstances, remand is unnecessary. (*People v. Belmontes*, *supra*, 34 Cal.3d at p. 348, fn. 8.)

VII. The Trial Court's Stated Reasons in Support of its Sentencing Decisions Were Sufficient

Apart from his challenge to the sufficiency of the evidence in support of the trial court's findings that he committed three of his sex crimes on "separate occasions," i.e., the trial court's findings underpinning the three specific mandatory consecutive terms discussed in the previous part of this opinion, Garcia contends his sentence should be vacated in its entirety and his case remanded for resentencing, because the trial court did not adequately *explain its reasons* for its findings that his sex crimes were committed on separate occasions within the mandatory consecutive sentencing scheme prescribed in Penal Code section 667.6, subdivision (d), and/or did not adequately explain its reasons justifying the application of the alternative, discretionary consecutive sentencing scheme authorized under section 667.6, subdivision (c). We disagree.

A. Garcia Waived his "Insufficient Statement of Reasons" Sentencing Contention

Where a trial court has discretion to tailor a defendant's sentence based upon the particular circumstances of his or her case, a defendant cannot complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 348-353.) The reasons for this rule are both "practical and straightforward." (*Id*. at p. 353.) Deficiencies in a trial court's statement of reasons are easily prevented and corrected when called to the court's attention, and a forfeiture rule in this context operates to reduce the number of errors committed in the first instance, and to preserve the judicial resources otherwise used to correct them. (*Ibid*.) Forfeiture is not

the rule where a sentence is "unauthorized" under the law; a sentence is "unauthorized" where it "could not lawfully be imposed under any circumstance." (*Id*. at p. 354.)

Garcia's current case falls squarely within these forfeiture rules insofar as Penal Code section 667.6, subdivision (c), is concerned.[4] There is no legal dispute that, in the event trial court found Garcia had not committed his offenses on separate occasions, the court had discretion nonetheless to impose consecutive sentences.[5] If the trial court's stated reasons for such a sentencing choice were deficient, then the matter should have been brought to the court's attention. Had this been done, the court could have corrected any errors. The failure to do so forfeited any claim of error on appeal. (*People v. Scott*, *supra*, 9 Cal.4th at p. 353; *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 412-413.)

B. We Find No Consecutive Sentencing Error in any Event

Assuming that Garcia did not forfeit his sentencing claim, we would not vacate his sentence in any event. As we have already noted, we construe the trial court's comments at the sentencing hearing as embodying two distinct facets. First, the trial court made factual findings that Garcia committed each of his multiple sex crimes on separate occasions, mandating consecutive terms under Penal Code section 667.6, subdivision (d). As an alternative, the trial court signaled its intent, in the event mandatory consecutive sentencing did not apply, to impose the discretionary consecutive terms. Relying almost wholly on *People v. Irvin* (1996) 43 Cal.App.4th 1063 (*Irvin*), Garcia contends a criminal trial court is required to explain its reasons for making any factual findings underpinning the imposition of mandatory consecutive terms pursuant to section 667.6, subdivision (d), and that the trial court did not do so in his case. Stated in other words, Garcia contends his sentence must be vacated in favor of a new sentencing hearing because the court did not explain why it factually found that his multiple sex crimes were committed on

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[4] Courts have held that improperly sentencing a defendant to consecutive terms under Penal Code section 667.6, subdivision (d) results in an unauthorized sentence. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1091.)

[5] In the event the trial court found Garcia had committed his multiple sex crimes against Cynthia on separate occasions, mandatory terms were required.

"separate occasions." Garcia also relies on *Irvin* to support the proposition that a sentencing court is required to explain its reasons for imposing discretionary consecutive terms under section 667.6, subdivision (c), which, says Garcia, the trial court did not so do in his case.

Garcia's construction of *Irvin*, does not persuade us that his case should be remanded for an entirely new sentencing hearing. In *Irvin*, the defendant was convicted of 20 sex crimes, including 15 counts of sexual penetration, and the trial court imposed consecutive sentences on all 20 counts. On appeal, the defendant argued that there were only four "separate episodes of assaultive behavior." The Fifth District Court of Appeal remanded for a new sentencing hearing for the following reasons:

> "*We doubt any reasonable trier of fact could find every act or offense was committed on a separate occasion*. Given the manner in which the numerous digital penetrations were described by the victim in her testimony, it seems unlikely that all 20 sex offenses of which defendant was convicted occurred on 'separate occasions.' However, we also do not believe the trial court at resentencing is constrained to accept the defendant's suggestion of finding only four 'separate occasions.' Upon remand, if the court decides to resentence defendant under subdivision (d), it must give a factual explanation supporting its finding of 'separate occasions' for each count sentenced under that subdivision. An overall statement of the court's general impression of the evidence is insufficient. [¶] If the court decides to sentence pursuant to section 667.6, subdivision (c), and impose full, separate and consecutive terms for the sex offense counts that it determines did not occur on a separate occasion, it must also provide a statement of reasons for this sentencing choice. (*People v. Roberson* [(1988)] 198 Cal.App.3d [860,] 868.)" (*People v. Irvin, supra*, 43 Cal.App.4th at pp. 1071-1072, italics added.)

We read *Irvin* to stand for a more limited proposition than that advanced by Garcia. Under *Irvin*, remand for resentencing is justified where a review of the record leaves room for "doubt [whether a] reasonable trier of fact could find every act or offense was committed on a separate occasion." We are not faced with such a situation in Garcia's current case. With the exception of the single count for sexual penetration discussed in this opinion, a review of the record plainly discloses substantial evidence in support of the trial court's findings that Garcia committed his multiple sex crimes against

Cynthia on separate occasions. Stated another way, substantial evidence plainly supports the trial court's findings that Garcia had a reasonable opportunity to reflect after each of his sex crimes before resuming sexually assaultive behavior against Cynthia. Garcia simply has not persuaded us that a further statement of reasons for the trial court's factual findings is needed for us to understand the trial court's sentencing decision.

Insofar as Garcia contends that a trial court is required to state reasons for sentencing under Penal Code section 667.6, subdivision (c), we have already made it clear that we agree with this proposition. (See, e.g., *People v. Roberson, supra*, 198 Cal.App.3d at p. 868, citing *People v. Belmontes* (1983) 34 Cal.3d at pp. 347-348.) We believe, however, the trial court did so here. Indeed, the trial judge complied with the "crucial factor" of demonstrating a recognition that it was making a separate and additional choice in sentencing under section 667.6, subdivision (c) and also set forth a myriad of reasons for choosing to sentence full-term consecutive: that the crime was cruel and callous; that Garcia attempted to dissuade the victim from testifying and that the crime indicating advance planning. Though we would prefer to see a trial court be more thorough and specific when making a series of complex sentencing choices, we find the record sufficient here to say that remand is not necessary.

VIII. The Imposition of High Terms on the Sex Crimes Convictions Did Not Violate Garcia's Constitutional Rights to Trial

Garcia contends the trial court violated the constitutional precepts governing the imposition of "high term" sentences mandated under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), and that an application of the rewritten provisions of Penal Code section 1170 to "eliminate[] the middle term presumption" mandated under *Cunningham*, violates the ex post facto clauses of the federal and state Constitutions. We disagree.

A. The Legal Framework

Garcia committed his crimes on September 16, 2006. The United States Supreme Court decided *Cunningham* in January 2007, ruling that the imposition of an upper term punishment prescribed by the determinate sentencing law (DSL) based on a trial court's

findings of fact — other than recidivism — violates a defendant's United States Constitution Sixth and Fourteenth Amendments right to a jury trial. The Legislature responded to *Cunningham* by enacting Senate Bill No. 40 (SB40), which amended Penal Code section 1170, subdivision (b), to vest our state's sentencing courts with discretion to impose a term from a lower, middle or upper triad of prescribed punishment, without making specific factual findings. In March 2007, the Governor signed SB40 into law; it became effective immediately as an emergency measure.

In July 2007, our state Supreme Court issued its opinion in *People v. Sandoval* (2007) 41 Cal.4th 825 (*Sandoval*), explaining that SB40 prospectively freed our state's sentencing courts from the constraints on upper term sentences imposed by *Cunningham*. (*Sandoval*, at pp. 844-852.) The issue in *Sandoval* then became whether a defendant who had wrongly received an upper term sentence under the prior version of the DSL, i.e., who had been wrongly sentenced in violation of *Cunningham*, could be resentenced under the revised provisions of the DSL enacted by SB40, or, alternatively, under judicially crafted sentencing procedures which conformed the former DSL to constitutional principles in the same manner accomplished by SB40. (*Sandoval*, at pp. 845-846.) The Supreme Court declined to address directly the SB40 issue, but rejected the defendant's argument that "resentencing her under a scheme in which the trial court has discretion to impose any of the three terms would deny her due process of law and violate the prohibition against ex post facto laws." (*Sandoval*, at pp. 853-857.)

The trial court sentenced Garcia in November 2008, more than one year after our Supreme Court issued its opinion in *Sandoval*, *supra*, 41 Cal.4th 825.

B. Analysis

Although Garcia is correct that *Sandoval*, *supra*, 41 Cal.4th 825 did not directly address the issue of whether the prohibitions against ex post facto laws contained in the federal Constitution and our state Constitution would be violated by the application of SB40 in a case where a defendant's crimes were committed before the effective date of the enactment, his arguments have not convinced us that SB40 cannot be applied in such a situation without creating a constitutional complication.

As our Supreme Court explained in *Sandoval*, the question of whether a change in the law which might have some effect on a defendant's term of imprisonment violates the prohibition against ex post facto laws is a "matter of degree," and "depends on the significance of [the law's] impact." (*Sandoval*, *supra*, 41 Cal.4th at p. 854.) With this basic conceptual framework established, our Supreme Court in *Sandoval* discussed *Miller v. Florida* (1987) 482 U.S. 423 (*Miller*), in which the United States Supreme Court held that a change in Florida's sentencing guidelines raising a presumptive sentence range for a defendant's offense could not be applied to the defendant because he had committed his offense before the date the new guidelines became effective. Like our Supreme Court colleagues, we also begin consideration of Garcia's arguments in his current appeal in the light of the rules articulated in *Miller*.

In *Miller*, Florida had established a sentencing scheme under which a "score" was calculated based upon the offense of which the defendant was convicted, the defendant's prior record and legal status at the time of the offense, and the injury inflicted on the victim. A "presumptive sentencing range" was prescribed for each score. If a trial court imposed a sentence within the presumptive range, the court was not required to provide reasons for its decision, and it could not be reviewed. A trial court could deviate from the presumptive range, but only if clear and convincing evidence warranted such a departure. A sentence outside the presumptive range required a trial court to provide a statement of reasons and was reviewable on appeal. (*Miller*, *supra*, 482 U.S. at pp. 425-426.) *Miller* involved a defendant who, at the time he committed his sex offenses, would have been subject to a presumptive range sentence between three and one-half years and four and one-half years. (*Id*. at p. 424.) At the time of his sentencing hearing, however, the law had been changed so that the presumptive range for an offender with his score had been increased to a term of between five and one-half years and seven years, and in accord with the sentencing scheme in effect at the time of sentencing, the trial court applied the guideline in effect at the time of sentencing and imposed a seven-year term. (*Ibid*.) The United States Supreme Court ruled that the trial court's application of the change in Florida's sentencing scheme violated the constitutional prohibition against ex post facto

laws because no feature of the revised sentencing scheme could have been considered "ameliorative," and it was undisputed that the presumptive range of punishment had been increased for the purpose of punishing sex offenders more heavily. (*Id*. at pp. 431-434.)

The circumstances in Garcia's current case do not reflect a similar "degree" of change in the law as was presented in *Miller*. Nothing in SB40 changed the existing triads of punishments for any of Garcia's myriad crimes. SB40 did no more than remove the prior provisions of the DSL calling for imposition of the middle term in the absence of a trial court's factual findings of aggravating or mitigating circumstance. SB40 was not intended to — and it would not necessarily be expected to — have the effect of increasing the sentence for any particular crime. In other words, at the time Garcia was sentenced, the trial court could have exercised its discretion to sentence him to a *lower* term. SB40 amounts to no more than a change in the procedural avenues by which a trial may reach its final sentencing decision. Application of SB40 will never result in a harsher sentence than was possible under the prior versions of the DSL, and, indeed, it affords a defendant an opportunity to persuade a trial court (as Garcia did) to exercise its discretion to impose a lower sentence. To the extent the removal of the requirement that the middle term be imposed in the absence of aggravating or mitigating circumstances may be viewed as granting the trial court greater discretion to impose the upper term, the revision would afford the court an equally increased discretion to impose the lower term. Unlike the situation presented in *Miller*, a sentencing judge applying SB40 has discretion to depart downward from what might be considered the norm, or middle term. In short, Garcia's arguments simply have not persuaded us that SB40 cannot be applied by a sentencing court without running afoul of the constitutional prohibition against ex post facto laws.

Garcia's reliance on Penal Code section 3 does not persuade us differently. Section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared." Our Supreme Court has construed this statutory language to prohibit a similar evil as the constitutional prohibition against ex post facto laws. (*People v. Grant* (1999) 20 Cal.4th 150, 156-158.) As the court has explained: "In general, application of a law

is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date." (*Id*. at p. 157.) For the reasons explained above, we find that SB40 does not attach new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was completed before SB40 became effective.

IX. *Sandoval* Established the Prevailing Law on Garcia's Ex Post Facto Claims

In a variation on his argument discussed in the previous part of this opinion, Garcia contends any application of the "judicial reformation" of Penal Code section 1170 as articulated by our Supreme Court in *Sandoval*, *supra*, 41 Cal.4th 825 would result in a violation of his right to due process because it effectively results in an ex post facto law by enlarging the criminal culpability which he would have faced at the time he committed his crimes in 2006. Garcia offers this argument in the event we agreed with his ex post facto and retroactivity challenges to SB40, but were nonetheless considering the option of remanding his case for a new sentencing hearing at which, in lieu of SB40, *Sandoval*'s judicially crafted sentencing procedures would be applied. Inasmuch as we have rejected Garcia's challenges to the application of SB40 in his case, his challenges to *Sandoval* are moot. We are, in any event, obliged to follow the Supreme Court's ruling in *Sandoval* that the judicially crafted sentencing procedures which it formulated do not violate the constitutional prohibition against ex post facto laws (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and we are not persuaded by Garcia's arguments to reach a different conclusion.[6]

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[6] If we understand his argument correctly, Garcia contends that, at the time he committed his crimes in 2006, California's DSL – as subsequently ruled in *Cunningham* – embodied a constitutionally invalid sentencing scheme under which he could not have lawfully been sentenced to high terms in the absence of a jury's factual findings of aggravating factors, and that the ensuing changes to the DSL wrought by the Supreme Court in *Sandoval*, in the event they were applied in his case, would expose him to high term sentencing at the trial court's discretion. In other words, Garcia essentially claims a constitutional right to be sentenced under California's constitutionally invalid sentencing laws which were in existence at the time he committed his crimes.

X. Garcia's Sentences on Counts 12 and 13 Violate Penal Code Section 654

Garcia contends the trial court erred by imposing consecutive sentences on his convictions for false imprisonment (count 12) and criminal threats (count 13) against Jason because those two crimes were committed during an indivisible course of conduct within the meaning of Penal Code section 654. According to Garcia, he should have been sentenced to a single term on only one of the counts — the term imposed on either count because the punishments are the same for each offense — with sentencing stayed on the other count. We agree.

The test for applicability of Penal Code section 654 was stated in *Neal v. State of California* (1960) 55 Cal.2d 11, and remains the same: "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal*, at p. 19.) Section 654 precludes the imposition of multiple punishments for a single act or a course of conduct indivisible in time and character. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The determination whether a defendant's course of conduct was indivisible within the meaning of section 654 entails a question of fact for the trial court, and, for this reason, a trial court's decision not to apply the section's prohibition on multiple punishments will be affirmed on appeal when it is supported by substantial evidence. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

Garcia argues:

> "In the present case, . . . multiple offenses were [committed] in connection with a continuing course of conduct motivated by a single animus. Here, that conduct involved Garcia's restraining, tying up and leaving Jason in the closet while threatening him with further bodily injury or death. In engaging in these physical acts, Garcia had the single objective of preventing Jason from interfering with or reporting the sexual assaults on Cynthia. This single intent animated all of Garcia's actions in the course of the physical restraint and verbal threats made toward Jason . . . . As such, the only possible conclusion is that Garcia was engaged in an indivisible course of conduct with a singular objective."

Relying on cases like *People v. Champion* (1995) 9 Cal.4th 879, 934-935, the People argue that Garcia committed separate criminal acts of violence against separate victims and can thus be separately punished. While this general legal proposition is accurate, counts 12 and 13 were both committed against the same victim – Jason S. The rule is thus inapplicable here.

We cannot discern any other objective indicated by Garcia's acts of falsely imprisoning Jason and threatening him other than a desire to ensure Jason do nothing to interfere with his continued sexual assaults on Cynthia. Though Garcia could have committed the crimes differently and in spite of the fact he committed them over the course of hours, as the People argue, this does not take the two counts out of the proscription of this rule.

The appropriate procedure for remedying a violation of section 654 is to stay execution of the sentence imposed on the offense with the lesser punishment; such stay becomes permanent when service of sentence on the offense for the sentence with the greater punishment is completed. (*In re Adams* (1975) 14 Cal.3d 629, 636-637.) Here, both crimes carry the same sentence. Accordingly, sentence on either one of the two counts must be stayed.

XI. The Trial Court Imposed the Wrong Indeterminate Term

Garcia contends, the People concede, and we agree that he should have been sentenced to a base term of 15 years to life for his conviction of forcible rape, rather than the term of 25 years to life imposed by the trial court. This change in the indeterminate term is required because the information pleaded only one aggravating circumstance, i.e., the personal use of a firearm, not multiple aggravating circumstances. (Compare Pen. Code, § 667.61, subd. (a), with § 667.61, subd. (b); see also § 667.61, subd. (e).)

DISPOSITION

The judgment is affirmed with directions to the trial court to modify Garcia's total aggregate determinate sentence by imposing an indeterminate term of 15 years to life, rather than 25 years to life, on his conviction on count 1 for forcible rape. Further, the trial court is to impose and stay sentence on either count 12 or 13. In all other respects, Garcia's convictions and sentence are affirmed. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

MOHR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.